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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Election Assistance Commission—Obligation of Fiscal Year 2004
Requirements Payments Appropriation

File: B-318831

Date: April 28, 2010

DIGEST

Election Assistance Commission (EAC) violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated certain grant programs to its fiscal year 2004 requirements payments appropriation. EAC used its requirements payments appropriation because of language in a conference report and the Office of Management and Budget apportionment. The plain language of the appropriation, however, was clear that the appropriation was legally available only for requirements payments. To correct its purpose violation, EAC should adjust its accounts and charge its grant obligations to its salaries and expenses appropriation, which is available “for necessary expenses to carry out [HAVA].” Given the passage of time, however, EAC commissioners may wish to seek and obtain congressional ratification of its improper grant expenditures.

DECISION

The Election Assistance Commission (EAC) Inspector General (IG) requested a decision regarding EAC’s obligation of certain grant payments made under the Help America Vote Act of 2002 (HAVA). Letter from Inspector General, EAC, to Acting Comptroller General, GAO, Oct. 13, 2009 (IG Letter). Among other things, HAVA authorizes EAC to distribute payments to states for enumerated purposes (“requirements payments”) and to make grants to some authorized programs (“poll worker and mock election grants”). At issue in this decision is EAC’s use of its requirements payments appropriation for poll worker and mock election grants. The IG asks whether EAC violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated these grant payments to its requirements payments appropriation notwithstanding the language of the appropriation. EAC justified its use of the requirements payments appropriation by pointing to language in a conference report and the apportionment made by the Office of Management and Budget (OMB). We conclude that EAC violated the purpose statute and should have charged its

obligations for poll worker and mock election grants to its salaries and expenses appropriation, which is available “for necessary expenses to carry out [HAVA].” EAC should adjust its accounts accordingly. If EAC, after adjusting its accounts, has insufficient funds available, EAC should report an Antideficiency Act violation under 31 U.S.C. § 1351 and recover the grant funds. Alternatively, EAC may wish to request congressional ratification of fiscal year 2004 actions.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency’s legal position on the subject matter of the request.¹ The IG included the relevant factual material and EAC’s legal view in its request for a decision. IG Letter at Appendix 3 (Memorandum from Chief Financial Officer and Director of Accounting, EAC, to Inspector General, EAC, Sept. 24, 2009, referred to hereafter as EAC Financial Memorandum).

BACKGROUND

The Help America Vote Act of 2002 established EAC to assist in the administration of federal elections. Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002); 42 U.S.C. §§ 15301–15545. HAVA authorizes payments to states for certain enumerated purposes, including meeting the requirements of Title III of HAVA.² These payments are called “requirements payments.” HAVA also authorizes EAC to make grants to certain election reform and voter education programs, including the Help America Vote Foundation,³ the Help America Vote College Program,⁴ and the National Student/Parent Mock Election⁵. These payments are called “poll worker and mock election grants.” EAC Financial Memorandum at 2–3.

For fiscal year 2004, Congress made two appropriations to EAC. Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, 118 Stat. 3 (Jan. 23, 2004). Congress provided \$1.2 million for salaries and expenses “to carry out the Help America Vote Act of 2002”⁶ and a total of \$1.5 billion “to carry out a program of requirements payments to States”.⁷ The \$1.5 billion for requirements payments was comprised of

¹ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html.

² Pub. L. No. 107–252, §§ 251–258; 42 U.S.C. § 15401.

³ Pub. L. No. 107–252, § 601.

⁴ Pub. L. No. 107–252, §§ 501–503.

⁵ Pub. L. No. 107–252, §§ 295–296.

⁶ Pub. L. No. 108–199, div. F, title IV, 118 Stat. at 327.

⁷ Pub. L. No. 108–199, 118 Stat. 3, 327, 451.

two amounts in the Consolidated Appropriations Act, 2004—\$500 million appropriated in Division F⁸ and \$1 billion in Division H.⁹ The Division F requirements payments appropriation is at issue in this decision. In the accompanying conference report, the conferees stated:

“The conferees agree to provide \$500,000,000 for Election Reform Programs Within the amount provided, the conferees also agree to provide \$750,000 for the Help America Vote Foundation, \$750,000 for the Help America Vote College Program, and \$200,000 for the National Student/Parent Mock Election”

H.R. Conf. Rep. No. 108-401, at 1020. According to the Inspector General, when OMB apportioned the \$500 million to EAC, it apportioned amounts for the three grant programs as set out in the conference report.¹⁰ IG Letter at Appendix 1 (SF-132 *Apportionment and Reapportionment Schedule*, dated Feb. 25, 2004). The IG undertook an account reconstruction of fiscal year 2004 appropriations and found that EAC obligated and expended funds from the Division F appropriation for the Help America Vote Act College Program and the National Student/Parent Mock Election. IG Letter at Appendix 2 (Election Assistance Commission, Reconstruction of Fund 95X1651 (803X)).

DISCUSSION

At issue here is whether EAC violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated funds from the fiscal year 2004 requirements payment appropriation for poll worker and mock election grants. The purpose statute permits EAC to obligate funds “only to the objects for which the appropriations were made except as otherwise provided by law.” *See* 31 U.S.C. § 1301(a).

To determine the purpose of an appropriation, the starting point is the plain meaning of the statute. B-303845, Jan. 3, 2006; B-287158, Oct. 10, 2002; B-290021, July 15, 2002.

⁸ *Id.*

⁹ Pub. L. No. 108–199, div. H, § 159.

¹⁰ Under the Antideficiency Act, the President is required to apportion funds to executive branch agencies. 31 U.S.C. §§ 1512, 1513. The President delegated this authority to the Bureau of the Budget, now OMB. Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note. An apportionment is the “action by which OMB distributes amounts available for obligation . . . in an appropriation or fund account.” GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 12. In this case, the IG concluded that it was unclear whether EAC requested the apportionment in this manner, but noted that EAC did not request a correction or reapportionment. IG Letter at 4.

If the statutory language provides an unambiguous expression of the intent of Congress, then the inquiry ends there. *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997); B-288658, Nov. 30, 2001. While views expressed in legislative history may be relevant in statutory interpretation, those views are not a substitute for the statute itself where the statute is clear on its face. *Squillacote v. United States*, 739 F.2d 1208, 1218 (7th Cir. 1984) (“Review of a Conference Report, as the most reliable form of legislative history, often may be helpful for clarifying the meaning of a statute which is ambiguous, at least so long as the statute at least ‘imperfectly’ expresses the message contained in the report However, even this form of legislative history may not be used to overrule a clear direction contained in the statute itself.”).¹¹

Here, the appropriations act was clear. It appropriated \$500 million “[f]or necessary expenses to carry out a program of requirements payments to States as authorized by section 257 of [HAVA].”¹² It also appropriated an additional \$1 billion “[for] an additional amount to carry out section 257 of [HAVA].”¹³ Section 257 of HAVA authorizes appropriations only for requirements payments. Other sections in HAVA—sections 296, 503, and 601—authorize appropriations for poll worker and mock election grants. Indicia in committee reports, including conference committee reports, and other legislative history as to how funds should or are expected to be spent do not establish legal requirements on the agency. 55 Comp. Gen. 307, 319 (1975). Because the appropriation at issue under section 257 of HAVA was available only for requirements payments, not for poll worker and mock election grants, EAC violated 31 U.S.C. § 1301(a) when it obligated funds from the appropriation for purposes other than requirements payments.

EAC maintains it was reasonable for it to rely on OMB’s apportionment when obligating funds for poll worker and mock election grants from this appropriation. EAC Financial Memorandum at 2–3. We have previously stated that an agency violates the law if it obligates funds without proper budget authority to do so even if it genuinely acts in reliance on OMB apportionment. B-290600, July 10, 2002. In

¹¹ See also *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (noting that even where Congress has shown an interest in funding certain programs, “these representations do not translate through the medium of legislative history into binding legal obligations”); 55 Comp. Gen. 307 (1975) (“as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there”); B-33911, B-62197, July 15, 1948 (“If the law does not authorize the expenditure of public moneys for a thing, it is not within the power of a committee of Congress . . . to provide the authority. The law itself must be changed.”).

¹² Pub. L. No. 108–199, div. F, title IV, 118 Stat. at 327.

¹³ Pub. L. No. 108–199, div. H, § 159.

B-290600, we concluded that the Air Transportation Stabilization Board (ATSB) and OMB violated the Antideficiency Act when ATSB obligated funds, based on OMB apportionment, to support a loan guarantee for America West Airlines prior to the availability of the budget authority. Also, OMB advises agencies not to use its apportionment of funds to determine the legality of using funds for a given purpose. OMB Circular No. A-11, *Instructions on Budget Execution*, pt. 4, § 120.18 (Aug. 7, 2009) (“The apportionment of funds should not be used as a means of resolving any question dealing with . . . the legality of using funds for the purpose for which they are apportioned. Any question as to the legality of using funds for a particular purpose must be resolved through legal channels.”).

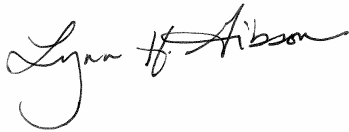
The IG also asked whether an Antideficiency Act violation occurred as a result of EAC’s obligation of funds from this appropriation. IG Letter at 8. The Antideficiency Act, codified at 31 U.S.C. § 1341, prohibits federal employees from incurring obligations in excess of available funds. Whether or not EAC violated the Antideficiency Act depends on whether there is an adequate unobligated balance in the appropriation to which EAC should have charged these obligations, in this case, the salaries and expenses appropriation. Because the requirements payments appropriation, by its terms, was not available for this purpose, EAC should have charged these obligations to its salaries and expenses appropriation, which was generally available “for necessary expenses to carry out the Help America Vote Act of 2002.”¹⁴ To correct its purpose statute violation, EAC must deobligate the amounts that were improperly charged to its requirements payments appropriation and charge these amounts to its salaries and expenses appropriation.

When adjusting its accounts, EAC should consider the account closing law. 31 U.S.C. §§ 1551–1553. Under the law, an appropriation available for a fixed period of time, such as EAC’s salaries and expenses appropriation, expires at midnight on the last day of its period of availability and is no longer available for incurring new obligations. *Id.* The expired appropriation remains available for a period of five fiscal years to record, adjust, and liquidate obligations properly chargeable to the appropriation. 31 U.S.C. § 1553(a). After 5 years, the expired appropriation is closed and the balances (whether obligated or unobligated) are canceled. 31 U.S.C. § 1552(a). Canceled balances are unavailable to pay any obligation even though properly incurred prior to the expiration of the appropriation. Instead, an obligation that would have been properly chargeable to the canceled appropriation must be paid from a current appropriation available for the same purpose. 31 U.S.C. § 1553(b). The aggregate total of such obligations may not exceed the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation. *Id.*

Here, by operation of law, the salaries and expenses appropriation closed on September 30, 2009, and all balances were canceled. *See* 31 U.S.C. § 1552; Pub. L. No. 108–199, div. F, title IV, 118 Stat. at 327. Therefore, under 31 U.S.C. § 1553(b),

¹⁴ Pub. L. No. 108–199, div. F, title IV, 118 Stat. at 327.

EAC would have to look to its current appropriations when adjusting its accounts to fix the fiscal year 2004 purpose violation. If, after adjusting its accounts, EAC finds that sufficient funds do not exist, EAC must report that overobligation to the President and Congress as a violation of the Antideficiency Act and transmit a copy of the report to the Comptroller General. 31 U.S.C. § 1351. Often, when adjusting accounts, an agency may have to recover amounts improperly obligated. However, given the passage of time and the impact on EAC's current salaries and expenses appropriation, EAC commissioners may wish to seek and obtain congressional ratification of EAC's poll worker and mock election grant expenditures in fiscal year 2004. *See* B-303927, June 7, 2005. Otherwise, EAC may have to seek additional appropriations to cover any obligations properly chargeable against closed accounts.

A handwritten signature in black ink, reading "Lynn H. Gibson". The signature is fluid and cursive, with the first name "Lynn" being the most prominent part.

Lynn H. Gibson
Acting General Counsel